UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ULYSSES DIAZ,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 17-009M
	:	
A.T. WALL, et al.,	:	
Defendants.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Acting *pro se*, Plaintiff Ulysses Diaz, a prisoner in the Adult Correctional Institutions ("ACI"), has brought claims pursuant to 42 U.S.C. § 1983 against Defendants A.T. Wall, James Weeden, Matthew Kettle, Jeffrey Aceto, Lieutenant Oden and Investigator Perry, all of whom are sued in their individual capacities and in their official capacities with the Rhode Island Department of Corrections ("Defendants" or "RIDOC").[1] Defendants ask the Court to dismiss the First Amended Complaint ("Complaint") (ECF No. 17) for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and because it fails to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). The motion has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons that follow, I recommend that it be granted with leave to amend.

I. BACKGROUND[2]

In June 2014, Plaintiff pled nolo contendere to manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance (heroin), as well as possession of a

[1] The Complaint also names Michelle Auger as a defendant. The docket reflects that Ms. Auger was not served and therefore is not a party in the case.

[2] As required for a motion to dismiss, except where otherwise indicated, the facts that follow are drawn from the allegations in the Complaint. ECF No. 17.

firearm in connection with a controlled substance offense.[3] He received a twenty-five-year sentence with ten years to serve, to be followed by twenty-five years of probation.

The instant case arises from a disciplinary proceeding at the ACI brought against Plaintiff for narcotics trafficking into Maximum Security a few months after the conviction, in November 2014. ECF No. 17 ¶ 13 & at 16. Following notice on November 19, 2014, and a hearing held on November 21, 2014, Plaintiff was found guilty of the charge "based on the investigators report and evidence obtained from the investigator," according to the attached ACI discipline record. Id. at 16-17. Plaintiff was sanctioned with placement in disciplinary confinement for one year with a one year of loss of visiting privileges, as well as the loss of one year of good time credit. Id. at 17. As part of the sanction, Plaintiff was also downgraded to High Security from Maximum Security after completion of the disciplinary confinement for an indefinite period, subject to quarterly review. Id. ¶¶ 16, 21.

Pivotal to the Complaint's due process claim is Plaintiff's allegation that "no evidence whatsoever was presented at the [disciplinary] hearing" that resulted in Plaintiff's punishment. ECF No. 17 ¶ 15. This sentence is contradicted by the ACI hearing record that Plaintiff attached to the Complaint, which states "guilty based on investigators report and evidence obtained though his investigation." Id. at 17. Plaintiff appealed the sanction to Defendants Assistant Director Kettle, Maximum Security Warden Weeden and Director Wall, informing them that there had been no evidence; yet they took no action to rectify the issue. Id. ¶¶ 24-25. As a result, all disciplinary review remedies have been exhausted. Id. ¶ 28.

[3] The basic facts of Plaintiff's charges, the disposition of those charges and his criminal sentence are a matter of public record. The Court may consider such matters in connection with a motion to dismiss without converting it to a motion for summary judgment. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).

The Complaint describes the privileges Plaintiff had been permitted before the sanction of segregation was imposed; they included the ability to associate with other inmates, play sports, have outdoor recreation, visit with family and friends, attend group religious services and educational and rehabilitative programs, hold a job, possess certain personal property, use the law library daily, and receive reading materials, such as books, magazines and newspapers. ECF No. 17 ¶ 17. After he was placed in segregation, Plaintiff was confined to a small cell for up to twenty-four hours per day and was permitted to leave it only on weekdays for thirty minutes of indoor recreation and a fifteen-minute shower. Id. ¶ 18. He was not allowed any visiting privileges; nor was he permitted to possess reading materials, to attend religious services, to view television, to listen to a radio or to enjoy any of his other previous privileges. Id. ¶ 19.

Plaintiff claims that he served the segregation sanction for the full year, following which he was transferred to High Security on "c-status" for an indefinite period with ninety-day classification reviews. ECF No. 17 ¶¶ 20-21. He ended up spending six months "on c-status," during which he was confined to a small cell for up to twenty-four hours per day, with only one hour of outdoor recreation in a "small dog-kennel style cage," "one ten-minute phone call per month," no visits and no entertainment privileges; during this period, he "was not allowed to attend religious services" and was in "extreme isolation." Id. ¶ 22-23. Plaintiff alleges that the isolation and the deprivation of environmental and sensory stimuli resulting from serving the year in segregation and six months on "c-status" has caused "severe depression, stress, anxiety, lethargy, paranoia, and . . . ongoing anti-social issues." Id. ¶¶ 26-27.

Based on these factual allegations, Plaintiff claims that RIDOC violated his "freedom of expression, free exercise of religion, and due process rights."[4] ECF No. 17 ¶ 30. More specifically, he contends that RIDOC's actions "constituted cruel and unusual punishment under the First, Eighth, and Fourteenth Amendment[s]," and violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, as well as the "Morris Rules" established by Morris v. Travisono, 310 F. Supp. 857, 872-74 (D.R.I. 1970). ECF No. 17 ¶ 30. He seeks a declaration that the Constitution, RLUIPA and the Morris Rules have been violated, an injunction expunging his disciplinary conviction and restoring all lost good time credit, punitive damages, and compensatory damages to compensate him for the emotional injury caused by the constitutional deprivations. Id. ¶¶ 32-37. According to Plaintiff, the crux of this case is the imposition of one year of segregation, followed by six months in close confinement, based on the finding made with no evidence that he was guilty of trafficking narcotics into Maximum Security. ECF No. 19-1 at 5.

Defendants have challenged the Complaint with this motion to dismiss. They argue that the Court lacks subject matter jurisdiction to consider claims based on the Morris Rules and that the balance of the Complaint fails to state a claim.

II. STANDARD OF REVIEW

When the court's jurisdiction is challenged by a motion to dismiss pursuant to a Fed. R. Civ. P. 12(b)(1), the Court must credit the pleaded factual allegations as true and draw all reasonable inferences from them in the nonmoving party's favor. Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001). Federal courts are courts of limited jurisdiction and it is the

[4] The Complaint also alleges that the Court has supplemental jurisdiction over unspecified "state law tort claims." ECF No. 17 ¶ 3. Seeing none in the pleading, I have not addressed whether any might be viable, except for a potential state-law claim based on the Morris Rules, which is addressed in footnote 5 *infra*.

plaintiff who "bears the burden of proving its existence." Pejepscot Indus. Park, Inc. v. Maine Cent. Railroad Co., 215 F.3d 195, 200 (1st Cir. 2000).

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the complaint must give Defendants fair notice of what the claim is and the grounds on which it rests, and allege a plausible entitlement to relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 559 (2007). The plausibility inquiry requires the Court to distinguish "the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012). The Court must then determine whether the factual allegations are sufficient to support "the reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011) (quoting Iqbal, 556 U.S. at 678) (internal quotation marks omitted). The complaint should not be read "too mechanically"; rather, review should be holistic with a heavy dose of common sense. Rodriguez-Vives v. P.R. Firefighters Corps of P.R., 743 F.3d 278, 283 (1st Cir. 2014). "The Court must accept a plaintiff's allegations as true and construe them in the light most favorable to the plaintiff, and review pleadings of a pro se plaintiff liberally." Tucker v. Wall, C.A. No. 07-406 ML, 2010 WL 322155, at *8 (D.R.I. Jan. 27, 2010).

In considering a motion to dismiss a prisoner's claim that his constitutional rights have been violated, the court must be guided by the principle that, while "prison officials are to be accorded substantial deference in the way they run their prisons, this does not mean that we will rubber stamp or mechanically accept the judgments of prison administrators." Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 40 (1st Cir. 2007). "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84

(1987). Also critical is that the court remain mindful that a *pro se* complaint is held to a less stringent standard than one drafted by a lawyer and is to be read with an extra degree of solicitude. Haines v. Kerner, 404 U.S. 519, 520 (1972); Rodi v. Ventetuolo, 941 F.2d 22, 23 (1st Cir. 1991).

III. ANALYSIS

A. Subject Matter Jurisdiction Over Morris Rules Violations

Almost fifty years ago, this Court created the Morris Rules in Morris v. Travisono, 310 F. Supp. at 872-74. They established certain procedures at the ACI and were issued as part of an interim decree that served to settle, at least temporarily, a civil rights suit over prison conditions brought by a group of ACI prisoners. In the final 1972 decree, the Court refrained from issuing an injunction because the prison administration agreed to promulgate the Morris Rules within ninety days. Morris v. Travisono, 373 F. Supp. 177, 179 (D.R.I. 1974), aff'd, 509 F.2d 1358 (1st Cir. 1975). Consistent with this commitment, in October 1972, the Rules were promulgated pursuant to the Rhode Island Administrative Procedures Act ("APA"), R.I. Gen. Laws § 42-35-1, *et seq.*, and filed with the Rhode Island Secretary of State. Id. Then, in 1973, RIDOC suspended the Morris Rules following a serious prison riot and two homicides. When the Morris Rules were not reinstated following this series of emergencies, the prisoner-litigants returned to the Court, which responded by enjoining prison officials from further suspending the Morris Rules. Morris, 373 F. Supp. at 185. In an addendum, the Court noted the importance of creating a procedure for "changing or modification of the Rules by the prison officials" without involving the Court, and stated its intention to generate a procedural guideline for these kinds of changes. Id. When this decision was affirmed by the First Circuit, that Court emphasized the inappropriateness of restricting the ability of prison officials to make a wide range of decisions

not of constitutional dimension, holding that "not all changes in the Morris Rules should require its [the Court's] approval." Morris, 509 F.2d at 1362.

During the years that followed, this Court has come to acknowledge that "[t]here is no doubt that discipline and administration of state detention facilities are state functions . . . subject to federal authority only where paramount federal constitutional or statutory rights supervene." Cugini v. Ventetuolo, 781 F. Supp. 107, 114 (D.R.I. 1992) (quoting Johnson v. Avery, 393 U.S. 483, 486 (1969)), aff'd, 966 F.2d 1440 (1st Cir. 1992). Based on this holding, the Court concluded that "state prisoner actions alleging violations of the Morris rules or seeking enforcement of those rules properly belong in state court because the rules were promulgated under state law and were meant to be dealt with by state machinery." Id. at 113. In 2001, the Court reinforced this holding: "this court lacks subject matter jurisdiction to entertain such claims brought under the so called Morris rules." Doctor v. Wall, 143 F. Supp. 2d 203, 208 (D.R.I. 2001). The Court emphasized the inappropriateness of allowing such claims to proceed in federal court – "Essentially, inmates at the ACI are attempting to turn the U.S. District Court into an appellate review board for classification and disciplinary procedures at the ACI established under Morris rules." Id. Based on these decisions, I find that the Morris Rules are state rules, "to be enforced, if at all, by state machinery." Doctor, 143 F. Supp. 2d at 204 (emphasis supplied); accord Williams v. Walls, C.A. No. 06-12S, 2006 WL 2854296, at *4 (D.R.I. Oct. 4, 2006) ("Morris Rules are state regulations, a plaintiff cannot bring a cause of action alleging violation of the Morris Rules in federal court without also alleging a federal constitutional or statutory violation.").

Plaintiff argues that this Court should allow his claim – that his discipline hearing violated the Morris Rules requirement that punishment may be imposed only based on

"substantial evidence" – to survive the motion to dismiss. In support of this argument, he relies on Nicholson v. Moran, 835 F. Supp. 692 (D.R.I. 1993), which acknowledged this aspect of the Morris Rules. Id. at 697. However, Nicholson actually holds that "[t]here is some question as to whether the more stringent Morris Rules standard should be the applicable standard in this 1983 action." Id. Rather than relying on the Morris Rules, Nicholson looked only to whether the procedures used satisfied the then-applicable constitutional requirement that there be "some evidence in the record." Id. (citing Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 454 (1985)). In any event, Nicholson is no longer persuasive authority – it issued before Doctor, 143 F. Supp. 2d 208, as reaffirmed in Williams, 2006 WL 2854296, at *4.

At bottom, the cases from this Court are clear: this Court lacks subject matter jurisdiction to consider alleged violations of the Morris Rules. Cugini v. Ventetuolo, 966 F.2d 1440, *3 (1st Cir. 1992) (unpublished table decision). Accordingly, I recommend that Plaintiff's claims based on the Morris Rules should be dismissed. See Akinrinola v. Wall, No. CV 16-370-M-LDA, 2016 WL 6462203, at *1 (D.R.I. Oct. 31, 2016).[5]

B. Procedural Due Process Violations

In its watershed Sandin decision, the Supreme Court held that "[t]he Due Process Clause standing alone confers no liberty interest in freedom [of prisoners] from state action taken 'within the sentence imposed.'" Sandin v. Conner, 515 U.S. 472, 480 (1995). In so holding, the

[5] By contrast with another recent case asserting claims based on the Morris Rules, Pona v. Weeden, C.A. No. 16-612S, slip op. (D.R.I. June 29, 2017) (magistrate judge decision not yet addressed by district court), Plaintiff does not appear to be claiming a state law cause of action over which this Court would have supplemental jurisdiction. Were this Court to consider such a claim, it should be rejected in light of the Rhode Island Supreme Court's seminal 1998 ruling that the adoption of the Morris Rules under Rhode Island APA was a nullity because the APA is not applicable to classification proceedings, disciplinary proceedings, or rule-making at the ACI. L'Heureux v. State Dep't of Corr., 708 A.2d 549, 553 (R.I. 1998); see DeCiantis v. Wall, 795 A.2d 1121, 1125 (R.I. 2002) ("The Morris Rules were born in the federal court in the context of a consent judgment and that is where they should be raised and laid to rest."). This Court must defer to L'Heureux's interpretation of Rhode Island law that, absent a constitutional or statutory liberty interest, the Morris Rules are not enforceable as a matter of state administrative procedure. See id. at 552-53. Because the Morris Rules are not enforceable under state law, they cannot support a viable state law cause of action.

Court confirmed that an inmate does not have a due process right to remain in the general population. Id. (citing Meachum v. Fano, 427 U.S. 215, 225 (1976) ("That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated.")). Sandin also established the guiding principle that the due process clause will not be implicated unless prison officials impose a punishment that is "an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. This is because "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" Goddard v. Oden, C.A. No. 15-055 ML, 2015 WL 1424363, at *2 (D.R.I. Mar. 27, 2015) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)). As long as the discipline "falls within the expected perimeters of the sentence imposed by a court of law," no liberty interest is implicated and due process rights do not accrue. Id. "Only changes in prison conditions resulting from discipline imposed without appropriate due process that constitute 'atypical' and 'significant' hardships sufficient to give rise to the loss of a liberty interest are potentially actionable under § 1983." Id.

Relying on a pre-Sandin decision, Superintendent, Massachusetts Correctional Institution, Plaintiff argues that the imposition of the sanction of one year of segregation followed by the loss of visiting privileges based on a hearing with no evidence states a plausible claim. 472 U.S. at 457 (without deciding whether due process applies, "some evidence" deemed sufficient for imposition of discipline). He contends that his sanction amounted to an "atypical and significant hardship," Sandin, 515 U.S. at 484, sufficient to implicate a liberty interest, so that he was entitled to due process based at least on "some evidence." Superintendent, Mass. Corr. Inst., 472 U.S. at 457.

This aspect of Plaintiff's complaint fails based on settled law[6] – it simply is not plausible to posit that one year of segregation, imposed following notice, a hearing and an appeal, in order to punish alleged drug trafficking by an inmate serving a substantial sentence for heroin distribution and related possession of a firearm amounts to an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484; see Skinner v. Cunningham, 430 F.3d 483, 486-87 (1st Cir. 2005) (no constitutional violation despite no hearing or fixed term because segregation of convicted murderer suspected of murder of another inmate was rational, duration was not excessive, and isolation from other prisoners was essential to its purpose). At the ACI, the sanction of one year in segregation for narcotics trafficking is established by the institution's rules and therefore is not atypical. See Pona v. Weeden, C.A. No. 16-612S, slip op. at 3 (D.R.I. June 29, 2017)[7] (segregation for up to one year is established consequence for smuggling narcotics into ACI). Further, courts in this district and elsewhere have repeatedly held that placement in punitive segregation for up to one year under analogous circumstances is not sufficient to implicate a liberty interest. Harris v. Perry, C.A. No. 15-222-ML, 2015 WL 4879042, at *6 (D.R.I. July 15, 2015) (plaintiff must plead more than placement in disciplinary segregation for one year following multiple hearings and appeal as sanction for narcotics trafficking); Benbow v. Weeden, C.A. No. 13-334 ML, 2013 WL 4008698, at *3-4 (D.R.I. Aug. 5, 2013) (plaintiff must plead more than placement in disciplinary segregation for a year following hearing and appeal as sanction for vicious attack on correctional

[6] Should the District Court be inclined to reevaluate this seemingly settled law, I alternatively recommend dismissal based on Plaintiff's failure plausibly to explain the factual underpinnings of his conclusory claim that there was "no evidence" presented at his hearing despite the reference in the attachment to the Complaint that he was found "guilty based on investigators report and evidence obtained through his investigation." Put differently, the claim also fails because the Complaint does not plausibly allege that constitutionally adequate process was not afforded to Plaintiff. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 555, 559.

[7] The reader should note that this citation is to a report and recommendation that is currently pending. It has not yet been acted upon by the District Court.

officer); see also Griffin v. Vaughn, 112 F.3d 703, 708-09 (3d Cir. 1997) (disciplinary detention for fifteen months not atypical); Lewis v. Williams, No. Civ. A. 07-1592(GEB), 2007 WL 1308309, at *8 (D.N.J. May 2, 2007) (fifteen days of disciplinary detention and one year of disciplinary segregation do not trigger protections of due process clause).

The characteristics of segregation found potentially "atypical" may be illustrated by Arauz v. Bell, in which a plaintiff, found not guilty after the hearing officer's finding was reversed, was still placed in administrative segregation indefinitely and remained there for nearly two years. 307 F. App'x 923, 930 (6th Cir. 2009); see also Cook v. Wall, C.A. No. 09-169S, 2013 WL 773444, at *2 (D.R.I. Feb. 28, 2013) (segregated confinement imposed with no hearing in retaliation for public criticism of RIDOC policy may be atypical when imposed on prisoner incarcerated for a relatively short period for non-violent offense).

Plaintiff counters these decisions with an interpretation of Sandin adopted by the Second Circuit. See Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (due process rights implicated by segregation for 305 days, which appeared to depart from ordinary incidents of prison life; decision emphasizes New York's failure to demonstrate that this discipline was comparable to period of deprivation typically endured by prisoners). This Court's research reveals that the Second Circuit's interpretation of Sandin relied on by Plaintiff has not been adopted in the First Circuit or elsewhere.[8] See Skinner, 430 F.3d at 486-87 (considering history of Supreme Court's

[8] In the district courts in this Circuit, Colon has been cited in cases where the discipline imposed was extreme. See, e.g., Hinds v. Pepe, No. 15-CV-10073-LTS, 2016 WL 1643742, at *3 (D. Mass. Apr. 25, 2016) (sanction to serve forty-two months in DDU implicates due process); Ford v. Clarke, 746 F. Supp. 2d 273, 282 (D. Mass. 2010) (sanction of ten years confinement in DDU implicates due process), judgment entered sub nom. Ford v. Bender, No. CIV.A. 07-11457-JGD, 2010 WL 4781757 (D. Mass. Nov. 16, 2010), vacated as moot, 768 F.3d 15 (1st Cir. 2014), and rev'd in part on other grounds, vacated in part sub nom. Ford v. Bender, 768 F.3d 15 (1st Cir. 2014); Boulanger v. U.S. Bureau of Prisons, Dir., No. 1:06-CV-308-WES, 2009 WL 1146430, at *10 (D.N.H. Apr. 24, 2009) (segregation for 379 days, without any hearing, implicates due process). Otherwise, it is cited for the proposition that segregation for a fixed term of up to one year following hearing and appeal, which is imposed, for example, for narcotics trafficking, does not trigger a judicial inquiry regarding the nature of the procedures used during the hearing. E.g., Harris v. Perry, 2015 WL 4879042, at *5.

oscillations on prison discipline and due process, including developments in other Circuits, First Circuit does not adopt approach used in Second Circuit); Perry v. Spencer, No. CV 12-12070-MPK, 2016 WL 5746346, at *14 (D. Mass. Sept. 30, 2016) (Second Circuit approach to Sandin, unique among Circuits, requires a fact-specific determination that compares duration and conditions of segregation with conditions in administrative confinement and general population; court declines to follow it). In any event, Colon seems to be grounded in the absence of anything to suggest that the duration of the sanction in that case was similar to "periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration." 215 F.3d at 231. By contrast, RIDOC has published rules setting up to one year in segregation as the established consequence for drug smuggling. Pona, slip op. at 3. I decline to recommend that this Court adopt the approach endorsed by Colon.

Plaintiff's second due process challenge derives from his post-segregation transfer based on his reclassification from Maximum Security to High Security, which he claims was imposed as part of the narcotics-trafficking discipline and, therefore, was based on the same alleged total absence of evidence. Citing Wilkinson v. Austin, 545 U.S. 209 (2005), Plaintiff claims that this classification to High Security imposed atypical punishment because it was of indefinite duration, with quarterly reviews, during which period he was prohibited almost all human contact and was limited to exercising for only one hour per day. Wilkinson holds that Ohio's classification of prisoners to a facility for an indefinite period with extreme conditions of confinement, including severe limitations on all human contact, cleared the atypicality bar raised by Sandin, so that due process rights attached. Id. at 224. Before making such a classification, the Supreme Court held that prison officials must afford the prisoner at least informal, non-adversary procedures calculated to address the risk that such an assignment was based on an

error. Id. at 225. Wilkinson emphasizes that the rigor of what amounts to a constitutionally-minimal procedure is cabined by the State's important interests in prison security, including the profound safety concerns posed by prison gangs, as well as by the State's legitimate interest in conserving scarce resources. Id. at 227-28.

In Morgan v. Wall, C.A. No. 10-241S, 2010 WL 3767691, *3 (D.R.I. Aug. 31, 2010), adopted, 2010 WL 3767709 (D.R.I. Sept. 24, 2010), this Court analyzed Wilkinson's applicability to transfers to High Security, in light of Rhode Island law and mindful of the well-settled principle that transfer of a prisoner from one facility to another is generally not protected by the due process clause. See Meachum, 427 U.S. at 225. Morgan examined applicable Rhode Island authority, which contrasts with the state law on which Wilkinson was based, in that it affords RIDOC's Director "unfettered final discretion over the classification and housing of prison-inmates in this state." Id. at *4. Morgan holds that Rhode Island state law provides no source of entitlement for a liberty interest regarding classification. Id. (citing Bishop v. State, 667 A.2d 275, 277 (R.I. 1995); see Taylor v. Levesque, 246 F. App'x 772, 774 (2d Cir. 2007) (dismissing prisoner's due process claim regarding classification because Connecticut law commits classification decisions to discretion of Commissioner of Corrections). Based on Morgan, I find that Rhode Island's classification process does not give rise to a liberty interest such that a due process deprivation may be actionable. See Tucker, 2010 WL 322155, at *8-9 (to avoid dismissal, complaint based on reclassification without notice must colorably allege violation of life, liberty or property interest) (citing Wilkinson, 545 U.S. at 221); Briggs v. Wall, C.A. No. 09-456S, 2009 WL 4884529, at *4 (D.R.I. Dec. 16, 2009) (claim regarding change in classification to High Security dismissed; no violation of procedural due process for "placing him in the High Security Center without classification board hearing."); Lynch v. Pelissey, C.A.

No. 06-409T, 2008 WL 782832, at * 3 (D.R.I. Mar. 20, 2008) (no liberty interest in not being assigned to High Security because such assignment was not "an 'atypical and significant hardship' in relation to the ordinary instances of prison life").

In any event, assuming *arguendo* that Plaintiff did have a liberty interest in avoiding transfer to High Security based on a mistake or error, I find that this Complaint does not plausibly allege that RIDOC failed to provide him with adequate procedural safeguards. The facts as alleged in Plaintiff's Complaint are that the transfer followed the imposition of a term of segregation for narcotics trafficking; the finding of guilt for narcotics trafficking was the product of a hearing and was, according to RIDOC, based on evidence derived from an investigation. According to Plaintiff, the imposition of punishment was based on no evidence. However, he also alleges that he was afforded the right to an appeal to RIDOC officials at the highest level, and that he was able to explain to them that there was no evidence that he was guilty of narcotics trafficking.

The Complaint contains no other description of the process by which he was placed in High Security, nor does it identify any deficiencies in the process beyond his conclusory assertion that the guilty finding at the original hearing was based upon "no evidence." The only plausible inference permitted by the Complaint is that the appeal from the hearing amounted to some process calculated to assure the avoidance of a classification error, so that the standards of Wilkinson are met. 545 U.S. at 228 (procedure may be informal and non-adversarial without permitting testimony from witnesses). Therefore, even if the Court assumes that this claim is legally viable in that the consequence is "atypical," it still fails because Plaintiff has not plausibly alleged facts from which it could be inferred that RIDOC deprived him of adequate procedural

safeguards in assigning him to High Security. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 555, 559.

The third sanction that Plaintiff claims was imposed without procedural due process is the loss of visiting privileges.[9] While Plaintiff's development of this claim is skimpy, mindful of his *pro se* status, I have considered it, but find it to be unavailing based on the cases establishing that a prisoner's loss of visiting privileges is a typical aspect of prison life and, standing alone, is insufficient to give rise to a due process violation. Henry v. Dep't of Corr., 131 F. App'x 847, 850 (3d Cir. 2005) (permanent restriction on contact visits as sanction for drug-related disciplinary offense was not atypical hardship); see Overton v. Bazzetta, 539 U.S. 126, 134 (2003) (restrictions on visits to inmates with in-prison substance abuse violations found constitutionally acceptable). As this Court has held, "Prisoners have no associational right to receive visitors, whether it be a spouse, children, or anyone else . . ."; the right to meet and visit with whomever a prisoner chooses is terminated by the criminal trial. Dewitt v. Wall, C.A. No. 01-65T, 2001 WL 1136090, at *3 (D.R.I. July 31, 2001), aff'd, 41 F. App'x 481, 482 (1st Cir. 2002).

Based on the foregoing analysis, I recommend that all of Plaintiff's due process-based challenges to the sanctions imposed based on narcotics trafficking be dismissed because they do not implicate a liberty interest as required by Sandin, or because they otherwise fail to state a claim.

C. First Amendment Violations – Ban on Reading Material

[9] Plaintiff also attacks the loss of good time credit. The cases interpreting Rhode Island's good time credit statute make clear that the loss of good time credit cannot form the basis for a viable claim, in that this consequence cannot amount to the loss of a liberty interest as a matter of law. Benbow, 2013 WL 4008698, at *4; Moore v. Begones, C.A. No. 09-543 S, 2010 WL 27482, at *4 (D.R.I. Jan. 4, 2010) (Rhode Island good time credit statute is discretionary and does not create a liberty interest); Almeida v. Wall, C.A. No. 08-184 S, 2008 WL 5377924, at *7 (D.R.I. Dec. 23, 2008) (same). Accordingly, Plaintiff's allegations regarding lost good time credit should be dismissed.

Plaintiff alleges that his First Amendment rights have been violated because, during the time in segregation, he was not able to have reading material. It is long settled that, while inmates do have a limited First Amendment right to possess reading material, a policy that restricts what is available to an inmate in segregation is not constitutionally deficient as long as it is "reasonably related to the deterrence of bad behavior and the maintenance of order and security in a prison, as applied to intransigent inmates." Beard v. Banks, 548 U.S. 521, 530-33 (2006) (no First Amendment violation where denial of all access to newspapers, magazines and photographs for "intractable" inmates in long-term segregation reasonably related to legitimate interests in providing incentives for better prison behavior); see, e.g., Sizemore v. Williford, 829 F.2d 608, 610 (7th Cir. 1987) (non-content-based disruption in reading materials may be dismissed for failure to support cause of action grounded upon the First Amendment); Anctil v. Fitzpatrick, No. 1:16-CV-00107-JAW, 2016 WL 6205755, at *4 (D. Me. Oct. 24, 2016) (denial of newspaper access for two-week period in segregation does not violate the constitution), adopted, 2016 WL 7076993 (D. Me. Dec. 5, 2016); Podkulski v. Doe, Civil No. 11-cv-102-JL, 2011 U.S. Dist. LEXIS 154781, at *20-23 (D.N.H. Dec. 20, 2011) (policy of restricting reading materials available to inmate in segregation reasonably related to the deterrence of bad behavior and maintenance of order and security in a prison, as applied to intransigent inmates). Further, in addressing limits placed on access to reading materials, the Court must accord prison administrators significant deference in defining legitimate goals for the corrections system, and for determining the best means of accomplishing those goals. Starr v. Moore, No. 09-CV-440-JL, 2010 WL 3002107, at *4 (D.N.H. July 27, 2010), adopted, 2010 WL 3282573 (D.N.H. Aug. 18, 2010). Limiting the access to reading materials of prisoners with the most serious behavioral

problems is consistent with an appropriate experience-based professional judgment by prison officials seeking to further legitimate prison objectives. Beard, 548 U.S. at 533.

As pled, Plaintiff's allegation based on the denial of access to reading material as a sanction for narcotics trafficking fails to state a claim because the Complaint does not plausibly describe how this limitation went beyond what is reasonably related to legitimate correctional goals, most importantly, the goal of deterring bad behavior. Beard, 548 U.S. at 530-33. Accordingly, I find that the Complaint fails to state a viable claim that these restrictions violated the First Amendment. Based on that finding, I recommend that all such claims be dismissed.

D. RLUIPA Violations – Ban on Attendance at Religious Services

Plaintiff alleges that his RLUIPA (and First Amendment) rights have been violated because he was not permitted to attend unspecified religious services while in segregation for narcotics trafficking or while serving time in High Security. The Complaint does not allege that he was prohibited from practicing his religion in his cell, during his recreation time, or by having a clergy member of his professed religion visit him at his cell. Nor does he explain what is his religious belief system, whether his religious beliefs are sincerely held or even what services he was unable to attend. He also fails to allege that this limited restriction on the practice of religion was not reasonably related to the prison's legitimate security interests, or that this limitation was not the least restrictive way of furthering those interests. See Harris v. Wall, 217 F. Supp. 3d 541, 554 (D.R.I. 2016) (RLUIPA requires claimant to allege facts establishing that religious beliefs are sincere and that RIDOC policy "substantially burdens . . . exercise of religion"; if he does, burden shifts to RIDOC to show that its policy (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest"); Crittendon v. Campbell, No. 2:05-cv-0845-WKW, 2007

WL 2853398, at *7 (M.D. Ala. Sept. 27, 2007) (while in segregation plaintiff could not attend religious services; claim fails based on prisoner's failure to allege that this was not reasonably related to the prison's legitimate security interests) (citing Turner v. Safley, 482 U.S. at 89). In short, Plaintiff's religion-based claims should be dismissed because Plaintiff has failed to assert plausible facts sufficient to allege a substantial burden on his practice of a sincerely-held religious belief.

The RLUIPA claim also founders on the recognized relationship between, on the one hand, a restriction on participation in religious services with the general population and, on the other hand, the need to isolate a prisoner based on the security concerns that arise when a convicted drug dealer (like Plaintiff) is trafficking narcotics into Maximum Security. See Arauz, 307 F. App'x at 928 (if security concerns prevent prison officials from permitting inmate access to congregate religious services while in segregation, such deprivation does not violate First Amendment as long as individual religious counseling permitted); Gayle v. Harmon, 207 F. Supp. 3d 549, 554 (E.D. Pa. 2016) (restriction on attending services while in segregation, which was rationally related to legitimate penological interest, did not violate RLUIPA); Ajala v. Boughton, No. 13-CV-545-BBC, 2015 WL 1814946, at *4 (W.D. Wis. Apr. 22, 2015) (prohibition on participation in group worship by plaintiff in segregation for gang-related conduct does not violate RLUIPA); Proverb v. O'Mara, No. CIV 08-CV-431-PB, 2009 WL 368617, at *11 (D.N.H. Feb. 13, 2009) ("group activities in prison . . . are subject to reasonable regulation to insure the security and safety of the institution, staff, and the inmates, and are not constitutionally guaranteed"), adopted sub nom., Proverb v. Superintendent, HCDOC, 2009 WL 1292126 (D.N.H. May 6, 2009). Further, an inmate whose misconduct justifies denial of access to group services lacks standing to challenge a ban on such access for all prisoners in

segregation, whether or not justified. Id., at *5. Plaintiff presents no plausible facts to suggest that he would have standing to challenge a blanket prohibition, if RIDOC imposes one.

Based on the foregoing, I find that the Complaint, even when construed liberally, fails plausibly to state a violation of Plaintiff's RLUIPA or First Amendment right to practice his religion. Accordingly, I recommend that Plaintiff's claims based on the ban on attendance at religious services with the general population during the period of punitive segregation or while in High Security be dismissed for failure to state a claim.

E. Eighth Amendment Violations – Ban on Outdoor Recreation

Plaintiff alleges that, during the time in punitive segregation, he was limited to thirty minutes of indoor recreation, no outdoor recreation, and only a fifteen-minute shower, resulting in a total of forty-five minutes out of his cell per weekday, and none on weekends, for a total of two and a half hours of exercise per week. ECF No. 17 ¶¶ 18-19. While the pleading is ambiguous,[10] I analyze this aspect of Plaintiff's Complaint as arising under the Eighth Amendment, which prohibits prison conditions that are inhumane and prison officials who are deliberately indifferent to the inhumane conditions. Wilson v. Seiter, 501 U.S. 294, 302-03 (1991).

Generally, "[w]hile the constitution does not compel prisons to provide inmates with outdoor exercise, 'the near-total deprivation of the opportunity to exercise may violate the Eighth Amendment unless the restriction relates to a legitimate penological purpose.'" Graham v.

[10] The Court has also considered whether Plaintiff's Eighth Amendment claim is intended more broadly to allege that segregation resulting in limits on human contact for a year based on narcotics trafficking amounts to cruel and unusual punishment. If so, it must be dismissed based on his failure plausibly to plead that RIDOC officials inflicted inhumane conditions and acted with "deliberate indifference." Wilson v. Seiter, 501 U.S. 294, 302-03 (1991); see Harris v. Perry, 2015 WL 4879042, at *5-6 (to implicate Eighth Amendment, prison conditions must be inhumane and officials must be deliberately indifferent to the inhumane conditions; "[d]isciplinary segregation, even for periods as long as twenty-six months, does not constitute cruel and unusual punishment") (quoting Green v. Hearing Officer on report 452704, No. CIV. 14–857 ADM/BRT, 2015 WL 2381590, at *2 n. 7 (D. Minn. May 19, 2015).

Grondolsky, CA No. 08-420208-MBB, 2012 WL 405459, at *13 (D. Mass. Feb. 7, 2012). As articulated by the Seventh Circuit, the deprivation of indoor and outdoor recreation for a prisoner in protective segregation imposes "inconvenience and discomfort, both of which fall outside the eighth amendment." Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988). Thus, a limit of forty-five minutes per week out of the cell has been held permissible, as long as the limitation does not result in actual injury. Wishon v. Gammon, 978 F. 2d 446, 449 (8th Cir. 1992); see Torres Garcia v. Puerto Rico, 402 F. Supp. 2d 373, 383 (D.P.R. 2005) (limitation of out-of-cell exercise to one hour per week is not unconstitutional *per se*). The Ninth Circuit has held that the denial of any outdoor exercise for prisoners in segregation for far longer than one year should trigger Eighth Amendment scrutiny. Toussaint v. Yockey, 722 F. 2d 1490, 1493 (9th Cir. 1984).

A comparison of the out-of-cell exercise Plaintiff was permitted (two and a half hours per week) with what is described in these cases (forty-five minutes to one hour per week) makes clear that Plaintiff's exercise claim does not come close to triggering the protections of the Eighth Amendment. The claim also fails because the Complaint does reflect a valid penological interest – the need to isolate and punish an inmate who endangers institutional safety by drug trafficking. Separately fatal is the Complaint's failure plausibly to allege that this specific deprivation caused objective harm or injury. While Plaintiff alleges generally that "placement in solitary confinement and supermax [caused] severe depression, stress, anxiety, lethargy, paranoia, and . . . ongoing anti-social issues," ECF No. 17 ¶ 27, he does not set out specific facts from which one could draw a reasonable inference that the denial of outdoor recreation during the year in segregation was objectively harmful and inflicted specific harm or injury. See Graham v. Grondolsky, 2012 WL 405459, at *13 (claim that subjecting plaintiff to lights for up

to twenty hours per day violated Eighth Amendment fails due to absence of specific allegations that lights were sufficiently intense and constant to the point of being objectively harmful).

Based on the foregoing, I recommend that Defendants' motion to dismiss the Eighth Amendment claim be granted.

F. Constitutional Violations – Denial of Other Prison Privileges

Plaintiff alleges that his constitutional rights were violated because certain privileges were taken away, such as working at his prison job and using the telephone, television and radio. ECF No. 17 ¶ 19. This Court has held that there is "no constitutional right to prison employment," and the prison officials have "discretion in assigning employment to detainees." Paye v. Wall, C.A. No. 15-12M-LDA, 2016 WL 1071006, at *1 (D.R.I. Mar. 17, 2016). Nor does a prisoner have a "*per se* constitutional right to use a telephone." Roy v. Stanley, 110 F. App'x 139, 141 (1st Cir. 2004) (quoting United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000); see Benzel v. Grammer, 869 F.2d 1105, 1108 (8th Cir. 1989) ("no right to unlimited telephone use."). Similarly, the loss of privileges such as access to radio or commissary "[do] not constitute a constitutional violation." Tillinghast v. Sousa, C.A. No. 13-797S, 2014 WL 2434646, at *3 (D.R.I. May 29, 2014). The loss of television privileges also does not amount to an atypical hardship. Schmitt v. Mulvey, No. 04–10717, 2006 WL 516755, at *3 (D. Mass. Mar. 1, 2006) (loss of television, radio and telephone privileges for months did not constitute atypical or significant hardship constituting deprivation of due process). And there is "no constitutional right of access to a prison gift or snack shop." Tokar v. Armontrout, 97 F.3d 1078, 1083 (8th Cir. 1996). Accordingly, Plaintiff's claims based on these deprivations should be dismissed for failure to state a claim.

IV. CONCLUSION

Based on the foregoing, I recommend that Defendants' Motion to Dismiss (ECF No. 18) be granted. Because Plaintiff may be able to cure the deficiencies in his pleading, I recommend that this Court provide him with thirty days from the adoption of this report and recommendation to file an amended complaint. Brown v. Rhode Island, 511 F. App'x 4, 5, 7 (1st Cir. 2013) (per curiam). If he fails to do so, or if the amended pleading still fails to state a claim or to invoke the Court's subject matter jurisdiction, it should be dismissed.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
July 10, 2017